Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1987
No. 86-1655

BRUCE TURGISS,
Petitioner

v.

ANNE FASSETT,
Respondent

and

JOHN L. BUCKLEY, JR.
Administrator of the Estate of
MONICA T. BUCKLEY, Deceased,
Respondent

RESPONSE MEMORANDUM OF RESPONDENT LOUIS D'ONOFRIO

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QUESTION PRESENTED FOR REVIEW

1. Whether the courts of appeals lack jurisdiction of an appeal by plaintiffs who have voluntarily dismissed their actions without prejudice by stipulation where plaintiffs seek to test interlocutory orders of the trial court rendering summary judgment in favor of and dismissing complaints against some, but not all, of the defendants and third-party defendants.

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STATEMENT OF THE CASE

Monica Buckley was killed and Anne Fassett was severely injured in automobile accident immediately following a fraternity party which they and the driver of the automobile had attended. Beer and liquor had been served at the party. Separate actions for the death and injuries were brought in the District Court for the Eastern District of Pennsylvania in which the plaintiffs alleged that Corbin F. Evans, the driver of the automobile in which Buckley and Fassett were passengers, had become intoxicated at the fraternity party and that the defendants were liable for conducting the fraternity party and causing liquor to be served to Evans, who was a minor. Various officers of the local chapter of the fraternity, its local and national chapters, and the tenants of the private residence where the party was held were named as defendants. One of the tenants subsequently became a third-party defendant in the Buckley action and one of the officers subsequently became a third-party defendant in the Fassett action.

Evans and Nicholas D'Alessandro, the driver of the second automobile involved in the accident, were joined as third-party defendants. Individual members of the local chapter of the fraternity were joined by defendant Christopher L. Troy as third-party defendants in the Buckley action and as second-level third-party defendants by third-party defendant Michael Bacha in the Fassett action.

The actions were consolidated for trial and assigned to the Honorable Louis Bechtle, J., of the United States District Court for the Eastern District of Pennsylvania. After extensive discovery and pretrial conferences Judge Bechtle concluded that there was no evidence upon which a jury could find anyone but defendant Troy and third-party defendant Peter J. Wynne, one of the members of the fraternity, liable for serving liquor to the minor driver Evans under applicable Pennsylvania law.

Judge Bechtle therefore granted motions for summary judgment and for dismissal of various third-party complaints which left the tenant Troy as the only defendant in both actions, and the two drivers, Evans and D'Alessandro, as third-party defendants in both actions, and Wynne as a third-party defendant in the Buckley action only. The District Court expressly declined to enter the necessary judgments or certify them pursuant to F.R.C.P. 54(b). R.561-2a.

Plaintiffs, however, did not wish to proceed to trial against defendant Troy and the remaining third-party defendants for economic and practical reasons of their own; because they had state court actions pending against Troy, his insurance was limited, and the costs of trial. R.561-3a, App. A-18-19.

When the case was called for trial on September 23, 1985, plaintiffs and the other remaining parties filed a stipulation of voluntary dismissal without prejudice pursuant to F.R.C.P. 41(a)(1). R.570a, 571a. Each plaintiff then filed a Notice of Appeal purporting to appeal from the prior Orders of September 17, 1985, which had granted the motions for summary judgment and for dismissal of the third-party complaints. R.573a, 575a.

The appeals were heard before a three member panel of the United States Circuit Court of Appeals for the Third Circuit consisting of Judges Adams, Stapelton and Garth, Jj. A majority of the panel, in an Opinion by Judge Garth, held that it had jurisdiction over the appeals because the voluntary dismissal as to the only remaining defendant, Troy, was final and appealable since the Pennsylvania statute of limitations had run and plaintiffs had disclaimed at oral argument any intention of reinstituting the federal court action against Troy. App. p. A-14-19. Judge Adams dissented on the grounds that the dismissal without prejudice was not a final order because the plaintiffs retained their causes of action against Troy since the bar of the statute of limitations was an affirmative defense which might not be pleaded

and because representations at oral argument are not of record and, in any event, counsel for defendant Troy had agreed not to assert the statute of limitations defense if plaintiffs lost their appeal and an action was reinstituted against Troy. App. p.A-41-44.

The majority of the panel reversed Orders of the District Court granting the summary judgments and dismissals, holding that all defendants who intentionally rendered substantial assistance to Evans' consumption of liquor could be held liable, and remanded for further proceedings in the District Court in accordance with that holding. App. p. A-36.

A Petition for Rehearing *en banc* was denied on January 9, 1987. Petitioner Bruce Turgiss, in whose favor the District Court had entered a summary judgment, who had been a defendant, filed this Petition for Writ of Certiorari on April 13, 1987. The Petition was promptly served and received by Respondent Louis D'Onofrio on April 14, 1987.

Respondent D'Onofrio files this Response Memorandum in order to assert before this Court that, regardless of whether plaintiffs' voluntary dismissal without prejudice of their actions was or was not a final order, the Circuit Court of Appeals lacked jurisdiction over plaintiffs' appeals because they voluntarily dismissed their actions without prejudice and such dismissal was not adverse to them and cannot be appealed by them.

Respondent D'Onofrio otherwise supports, without repeating, the Petitioner's contention that this Court should grant the Petition in order to review the action of the court below with regard to conformity to the requirements that federal courts must apply the substantive law of the states in a diversity case.

SUMMARY OF ARGUMENT

Plaintiffs who stipulate to the voluntary dismissal of their causes of action without prejudice may not prosecute appeals from the final determination which results from their voluntary dismissals since that determination is only that which they themselves procured and is not adverse to them.

Appellate courts lack jurisdiction to hear and determine appeals by plaintiffs who have voluntarily dismissed their action without prejudice and the Court of Appeals for the Third Circuit erred in holding that it had jurisdiction over such appeals in this case. Since it lacked jurisdiction over the appeals it also lacked jurisdiction to reverse interlocutory orders of the trial court finding in favor of some, but not all of the defendants and third-party defendants.

The appellate court also erred in basing its holding that it had jurisdiction over these appeals solely upon its determination that the voluntary dismissal without prejudice was a final determination. The voluntary dismissals here constituted a final determination because those dismissals completely disposed of the case in the trial court by dismissing the action as to the only remaining defendant and the remaining third-party defendants. While those dismissals may constitute a final determination since they completely dispose of the case in the trial court, the appellate court nonetheless lacks jurisdiction over the plaintiffs' appeals because that determination was voluntary and without prejudice and was the determination which the plaintiffs sought and therefore was not adverse to them

The holding of the Court of Appeals for the Third Circuit that it had jurisdiction over these appeals directly conflicts with decisions in the Fifth, Seventh and Ninth Circuits, and if permitted to stand would permit plaintiffs to determine for themselves when they may appeal and what issues they may bring before the appellate court on

those appeals. Upholding jurisdiction over the appeals in this case also directly conflicts with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure and its prohibition against appeals from interlocutory orders determining the rights of less than all of the parties.

The issue of lack of jurisdiction was directly presented in the appeals in this case.

This Court should grant the Petition and hold that the appellate court lacks jurisdiction over appeals by plaintiffs who have voluntarily dismissed their causes of action without prejudice, and therefore vacate the Order of the appellate court and dismiss the appeals in this case.

ARGUMENT

A Plaintiff Who Voluntarily Stipulates to the Dismissal of His Action Without Prejudice May Not Appeal Because Such a Dismissal Is Not Adverse to That Plaintiff, and The Circuit Court of Appeals Lacks Jurisdiction Over Such an Appeal.

The plaintiffs in both of these consolidated cases entered into a stipulation with the remaining defendant and third-party defendants pursuant to Rule 14(a)(1) and filed that stipulation immediately prior to the scheduled trial of their cases. Plaintiffs then filed appeals which purported to be appeals from prior orders of the trial courts which had entered summary judgments in favor of some, but not all, of the defendants and dismissed third-party complaints against some, but not all, of the third-party defendants. The stipulation by plaintiff Fassett expressly stated that the dismissal of her complaint was "without prejudice" (R.571a); the stipulation by the plaintiff in the Buckley case did not so state, but was without prejudice under Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure since it was not stated to be other than without prejudice. No action by the court was taken on these stipulations.

The holding by the Court of Appeals for the Third Circuit that it had jurisdiction over the appeals by plaintiffs who had voluntarily dismissed their actions without prejudice directly conflicts with decisions of the Courts of Appeals for the Fifth, Seventh and Ninth Circuits. In *Management Investors v. United Mine Wkrs., Etc.*, 610 F.2d 384 (5th Cir. 1979) the trial court had dismissed the plaintiff's pendent state claims whereupon the plaintiff moved for and was granted a voluntary non-suit without prejudice of its remaining federal claim; on appeal the court held that plaintiffs could not appeal from the order of the trial court granting the dismissal in accordance with the general rule that a plaintiff who has requested and been granted or agreed to a voluntary dismissal of his action without prejudice cannot maintain or prosecute an appeal from the order of dismissal. *Id.* at 393. In *Geaney v. Carlson*, 776 F.2d 140 (7th Cir. 1985) the court held that it lacked jurisdiction over an appeal by a plaintiff who had by motion requested dismissal of his suit while noting that he intended to appeal from that dismissal because of dissatisfaction with a prior interlocutory order; the trial court interpreted the motion as one for voluntary dismissal pursuant to F.R.C.P. 41(a)(1)(i). On appeal the court found no jurisdiction on the ground that if the motion was interpreted as a voluntary dismissal without prejudice there was no appellate jurisdiction because the dismissal was not adverse, and if the motion were interpreted otherwise there was no jurisdiction for other reasons. In *Fletcher v. Gagosian*, 604 F.2d 637 (9th Cir. 1979) the trial court had dismissed the plaintiff's complaint as to less than all of the defendants and plaintiffs then voluntarily dismissed as to the remaining defendants without prejudice under F.R.C.P. 41(a) and subsequently appealed, purporting to appeal from the dismissal of the complaint; the appellate court held that it lacked jurisdiction over such an appeal.

The decision in this case also directly conflicts with other decisions which hold that a plaintiff who procures

a dismissal of his action may not appeal the dismissal on the merits even though he may appeal from that portion of an order entered by the trial court which attached onerous conditions to the dismissal. In *Yoffe v. Keller Indus., Inc.*, 580 F.2d 126 (5th Cir. 1978) the plaintiff moved for voluntary dismissal without prejudice pursuant to Rule 41(a)(2) which the defendant opposed, and the trial court granted the motion in an order which also required the plaintiff to pay $134,000 in counsel fees to the defendant's attorneys. The appellate court recognized the validity of the general rule that where the trial court allows plaintiff to dismiss without prejudice the dismissal constitutes a final judgment for purposes of appeal but that a plaintiff cannot appeal therefrom since it does not qualify as an involuntary adverse judgment so far as the plaintiff who procured it is concerned. *Id.* at 129. The court concluded that the amount of the fees constituted legal prejudice and reviewed that portion of the order since the plaintiff had never acquiesced in the assessment of fees or the amount, held that the amount was reasonable, and therefore concluded that plaintiff could not bring the appeal and dismissed it. *Id.* at 131. The decision in the *Yoffe* case was consistent with other decisions in the Fifth Circuit which permitted review of conditions attached to dismissal orders, but not review of the dismissal of the case, finding that the conditions were improper and constituted legal prejudice, and therefore remanding for reconsideration of the conditions. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Alvarado v. Maritime Overseas Corp.*, 528 F.2d 605 (5th Cir. 1976). In *Cauley v. Wilson*, 754 F.2d 769 (7th Cir. 1985) the court put those decisions of the Fifth Circuit in perspective, concluding that a plaintiff may not appeal a voluntary dismissal without prejudice, but an appellate court should be able to decide whether the trial court erred in attaching the conditions and that an

appeal relating to the conditions should be heard and decided without regard to the lack of appellate jurisdiction over the case itself. *Id.* at 771.

This court has recognized ". . . the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error." *United States v. Procter & Gamble Company,* 356 U.S. 677, 680 (1958). In that case the plaintiff had been ordered by the trial court to produce various documents to its opponent for inspection but was unwilling to do so and therefore filed a motion in the trial court to have its order amended to provide that if production were not made the court would dismiss the complaint; the trial court entered such an order and subsequently dismissed the complaint when the plaintiff failed to produce the documents. This court held that the 'familiar rule' had no application in that case because the plaintiff had not assented but had always opposed the production orders and had, like the plaintiff in *Thomsen v. Cayser,* 243 U.S. 66 (1917), not consented to or procured the order involved but only suggested that if there should be such an order it should be in a final form rather than interlocutory. This Court treated the actions of the plaintiff in both of those cases as being involuntary and the dismissal orders in both cases were with prejudice and therefore were treated as a final determination against the plaintiffs of the entire case. In *United States v. Wallace & Tiernan Co.,* 336 U.S. 793 (1949) this Court declined to dismiss an appeal where the trial court had dismissed the plaintiff's action without prejudice after it had denied the plaintiff's motion for production of documents which were essential to the plaintiff's case because it found nothing in the record to indicate that the plaintiff had invited the entry of the dismissal order. *Id.* at 794, fn1. This court also noted there that the fact that the dismissal was without prejudice did not render dismissal unappealable because the dismissal ended the action so far as the trial court was concerned. *Ibid.*

Respondent submits that the Court of Appeals incorrectly formulated the issue of its appellate jurisdiction over plaintiff's appeals in this case by posing the question of its jurisdiction as one of finality and basing its assumption of jurisdiction on the conclusion that the dismissal was final. The Petitioner here continues to present the question as one of finality. Petition, p. 7-14. Plaintiff's voluntary dismissal was a final order because it fully terminated the case before the district court (*see United States v. Wallace & Tiernan Co., supra.*). Although the voluntary dismissal was final in the sense that it terminated the proceedings, it was not a final determination from which these plaintiffs could appeal since the plaintiffs themselves procured the dismissals, and the dismissal which they themselves sought was therefore not adverse to them.

Plaintiff's voluntary dismissal here was an action which they themselves took, without any approval or action by the trial court, and after the trial court had expressly declined to certify its prior rulings so as to render them final judgments subject to appeal under F.R.C.P. 54(b). Both actions remained viable until they were voluntarily dismissed without prejudice by the plaintiffs; the decision of the plaintiffs not to try the case when called was a decision which they alone made for reasons of their own convenience and expense. That decision was entirely voluntary and uncoerced by the trial court.

Rule 54 of the Federal Rules of Civil Procedure controls what orders of the trial court are appealable and what orders are not. Rule 54 provides that, in the absence of an express determination that there is no just reason for delay and an express direction for the entry of a final judgment, an order which adjudicates the liabilities of fewer than all of the parties does not terminate the action as to any of the parties and is subject to revision at any time before the entry of judgment as to the liabilities of all parties. Rule 54 therefore prohibits an appeal from the interlocutory orders of the court entering

summary judgments and dismissing third-party complaints as to only some of the defendants and third-party defendants. Neither these plaintiffs nor other plaintiffs ought to be permitted to prosecute appeals in cases which they themselves voluntarily dismiss and thus determine for themselves when and what they may appeal. If plaintiffs decide that they do not wish to pursue their actions and voluntarily dismiss them, the dismissal is only that which they themselves sought and one which they ought not to be permitted to appeal in order to attack interlocutory orders with which they are dissatisfied.

This Court should therefore vacate the order of the United States Court of Appeals for the Third Circuit entered December 5, 1986 and dismiss the appeals at Nos. 85-1652 and 85-1653 in that court.

The issue of lack of appellate jurisdiction over an appeal where the plaintiffs have voluntarily dismissed their appeal without prejudice was properly preserved and presented to the appellate court. The majority of the appellate court in its Opinion (App. p. A-13-14) notes that the majority of the third-party defendants filed motions for dismissal with the appellate court and that these motions were granted by a motions panel without prejudice to the rights to reinstate third-party complaints in the event of reversal, and that it therefore did not consider any brief which had been filed by those third-party defendants. Respondent D'Onofrio did *not* move for dismissal of the appeal as to him, and the motions panel did *not* dismiss the action as to him. Respondent D'Onofrio specifically presented for review the issue of the appellate court's lack of jurisdiction over an appeal by plaintiffs who voluntarily dismissed their actions (Brief for Appellee Louis D'Onofrio, p. 2) and argued that the appellate court lacked jurisdiction over the plaintiffs' appeals because they had voluntarily dismissed their action and could not appeal from that dismissal which was not adverse to them. (Brief, p. 14-22). Counsel for respondent D'Onofrio did attend the oral argument, at which

only counsel for plaintiffs and one defendant were heard. The appellate court did consider and decide the issue of its appellate jurisdiction. Consequently, the issue of lack of jurisdiction in the appellate court to hear or determine these appeals was squarely presented, both in the form under which the court decided it and in the form in which respondent D'Onofrio seeks to present it before this Court.

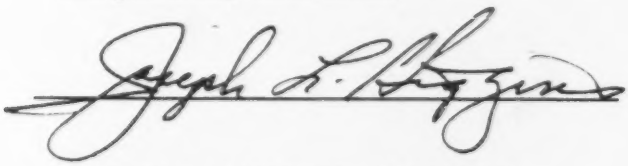
CONCLUSION

Plaintiffs who voluntarily dismiss their actions without prejudice may not prosecute appeals in those actions because the final determination resulting from their voluntary dismissals is not adverse to them and the appellate court therefore lacks jurisdiction over appeals by them. Since the appellate courts lacked jurisdiction over these appeals it similarly lacked jurisdiction to reverse otherwise interlocutory orders of the trial court and remand the cases for trial against defendants in whose favor the trial court had previously found by entering summary judgments or dismissals of complaints against them.

The decision of the United States Court of Appeals for the Third Circuit in this case that it had appellate jurisdiction over these appeals conflicts with the decisions of the Fifth, Seventh and Ninth Circuits and with the provisions of Rule 54(b), and with the policy of this Court prohibiting piecemeal appeals.

This Court should therefore grant the Petition for Certiorari and vacate the Order of the appellate court and dismiss plaintiffs' appeals.

Respectfully submitted,



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